

# SENATE RECORD VOTE ANALYSIS

105th Congress  
2nd Session

Vote No. 159

June 15, 1998, 5:11 p.m.  
Page S-6322 Temp. Record

## TOBACCO BILL/FDA Regulations and Advertising Tax Deduction

**SUBJECT:** National Tobacco Policy and Youth Smoking Reduction Act . . . S. 1415. McCain motion to table the Reed amendment No. 2702 to the Daschle (for Durbin) amendment No. 2437, as amended, to the instructions (Gramm amendment No. 2436) to the Gramm motion to recommit the Commerce Committee modified substitute amendment No. 2420.

### ACTION: MOTION TO TABLE FAILED, 47-47

**SYNOPSIS:** The "Commerce-2" committee substitute amendment (see NOTE in vote No. 142) to S. 1415, the National Tobacco Policy and Youth Smoking Reduction Act, will raise up to \$265.0 billion over 10 years and up to \$885.6 billion over 25 years from tobacco company "payments" (assessments) and from "look-back" penalties that will be imposed on tobacco companies if they fail to reduce underage use of tobacco products. Most of the money will come from the required payments (\$755.67 billion over 25 years). Additional sums will be raised from other fines and penalties on tobacco companies, and the required payments will be higher if volume reduction targets on tobacco use are not met. The tobacco companies will be required to pass on the entire cost of the payments to their consumers, who are primarily low-income Americans. By Joint Tax Committee (JTC) estimates, the price of a pack of cigarettes that costs \$1.98 now will rise to \$4.84 by 2007. The amendment will require the "net" amount raised, as estimated by the Treasury Department, to be placed in a new tobacco trust fund. (The net amount will be equal to the total amount collected minus any reductions in other Federal revenue collections that will occur as a result of increasing tobacco prices. For instance, income tax collections will decline because there will be less taxable income in the economy). The JTC estimates that the amendment will raise up to \$232.4 billion over 9 years, but only \$131.8 billion net. Extending the JTC's assumptions through 25 years, a total of \$514.2 billion net will be collected. The amendment will require all of that money to be spent; 56 percent of it will be direct (mandatory) spending. The Federal Government will give States 40 percent of the funds and will spend 60 percent. Medicare will not get any of the funding in the first 10 years unless actual revenues are higher than estimated in this amendment (in contrast, the Senate-passed budget resolution required any Federal share of funds from tobacco legislation

(See other side)

YEAS (47)			NAYS (47)			NOT VOTING (6)	
Republicans (43 or 83%)	Democrats (4 or 10%)		Republicans (9 or 17%)	Democrats (38 or 90%)		Republicans (3)	Democrats (3)
Abraham	Hutchinson	Feingold	Chafee	Akaka	Johnson	Burns- <sup>2</sup>	Durbin- <sup>2</sup>
Allard	Kempthorne	Ford	Collins	Baucus	Kennedy	Inhofe- <sup>2</sup>	Kerrey- <sup>2</sup>
Ashcroft	Kyl	Hollings	Coverdell	Biden	Kerry	Specter- <sup>3</sup>	Moseley-Braun- <sup>2</sup>
Bennett	Lott	Moynihan	D'Amato	Bingaman	Kohl		
Bond	Lugar		DeWine	Boxer	Landrieu		
Brownback	Mack		Hutchison	Breaux	Lautenberg		
Campbell	McCain		Jeffords	Bryan	Leahy		
Coats	McConnell		Roth	Bumpers	Levin		
Cochran	Murkowski		Snowe	Byrd	Lieberman		
Craig	Nickles			Cleland	Mikulski		
Domenici	Roberts			Conrad	Murray		
Enzi	Santorum			Daschle	Reed		
Faircloth	Sessions			Dodd	Reid		
Frist	Shelby			Dorgan	Robb		
Gorton	Smith, Bob			Feinstein	Rockefeller		
Gramm	Smith, Gordon			Glenn	Sarbanes		
Grams	Stevens			Graham	Torricelli		
Grassley	Thomas			Harkin	Wellstone		
Gregg	Thompson			Inouye	Wyden		
Hagel	Thurmond						
Hatch	Warner						
Helms							

#### EXPLANATION OF ABSENCE:

- 1—Official Business
- 2—Necessarily Absent
- 3—Illness
- 4—Other

#### SYMBOLS:

- AY—Announced Yea
- AN—Announced Nay
- PY—Paired Yea
- PN—Paired Nay



to be used to strengthen Medicare; see vote No. 84).

The Gramm motion to recommit with instructions would direct the Commerce Committee to report the bill back with the inclusion of the amendments already agreed to and the Gramm amendment No. 2437. The Gramm amendment would adopt the Gregg/Leahy amendment (see NOTE below) and would eliminate the marriage penalty in the tax code on couples earning less than \$50,000 per year. The tax relief would be structured so that married couples that received it would not consequently lose Earned Income Credit (EIC) eligibility.

The Durbin amendment, as amended, would cap the look-back penalties at \$7.7 billion annually and would shift the burden of those penalties on to those companies that have brands that do not meet the youth smoking reduction targets (see vote No. 149 for details). As amended by a Craig/Coverdell amendment, it would also fund anti-drug programs (see vote No. 151). As amended by a Gramm modified amendment, it would phase-in marriage-penalty relief over 10 years for married tax filers with incomes under \$50,000, and it would provide immediate 100 percent deductibility of health care costs for self-employed taxpayers (see vote No. 154). As amended by a Kerry amendment, it would require States to spend a quarter of their funding from this bill on Child Care Development Block Grants (see vote No. 157).

**The Reed amendment** would disallow a tax deduction for advertising by a tobacco company if that company violated the Food and Drug Administration (FDA) regulations on such advertising that were published in the Federal Register on August 28, 1996.

Debate was limited by unanimous consent. Senator Gorton moved to table the Reed amendment. Generally, those favoring the motion to table opposed the amendment; those opposing the motion to table favored the amendment.

NOTE: After the vote, the Reed amendment was adopted by voice vote.

Two Gregg/Leahy amendments were pending at the time of the vote (see vote No. 145).

**Those favoring** the motion to table contended:

Argument 1:

We object to the Reed amendment because it would cede a dangerous amount of tax authority to bureaucrats, it would be draconian in effect, it would create a precedent that could be used against other industries, and, not least, it would unconstitutionally restrict free speech rights. The FDA regulations in question are supposedly narrowly targeted on youth smoking, but any honest analysis would have to conclude that they are extremely broad. For instance, the regulations ban ball caps that have the names of cigarette brands on them, they ban advertising during auto races, and they require people selling tobacco products to check IDs for anyone under the age of 27. According to the FDA, if a car running around a race track has the word "Marlboro" on it, it is a de facto attempt to induce children to smoke. If the Reed amendment were to pass, and if a tobacco company fought the FDA in court on this regulation or other regulations, and lost a couple of years later, it would then owe hundreds of millions of dollars in back taxes, interest, and penalties. Even for a minor, unintentional violation the FDA could effectively enact a huge tax increase. Regulators should not have such authority. If this policy were adopted for tobacco, what rationale would our colleagues have for opposing similar policies for other products? For instance, food products should be safe--if health code violations are found at a food processing plant, then on what basis would our colleagues say that regulators should not be able to take away the advertising tax deduction for the food company that owned the plant? There is no rational basis for distinguishing between harm that may come from tobacco and harm that may come from any other product. Further, there is no constitutional basis. The tax increases will be so huge they will have a chilling effect on the free speech rights of tobacco companies. The companies will refrain from engaging in legal activities for fear of inadvertently violating a regulation or of being accused of violating a regulation. This authority is not narrowly tailored--it is based on draconian FDA regulations on free-speech rights and it imposes huge fines. Also, it discriminates against one disfavored type of company that is producing a legal product. In America, the way to win a debate is with the strength of one's views, not by suppressing opposing views. The First Amendment right to free speech is meant to protect the right to express unpopular views. No protection is needed to express popular views. In summary, the Reed amendment is clearly unconstitutional, it would unwisely give enormous taxing authority to a regulatory agency, and it would set a very dangerous precedent for the regulation of other products. We therefore strongly urge the rejection of this amendment.

Argument 2:

We must reluctantly oppose this amendment because we believe it is unconstitutional. If our colleagues had drafted their amendment so that it applied to any taxpayer who violated an FDA rule, rather than just a tobacco company, then we could have voted against the motion to table. Unfortunately, they did not.

**Those opposing** the motion to table contended:



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Tobacco companies have been guilty of targeting their advertising at children for decades. Industry documents show that they have tried to get children as young as twelve addicted to cigarettes, because they know that most smokers start when they are in their teens, and once they start smoking they will usually stay with the same brand for decades. The FDA has established that the tobacco companies' advertising that is directed at children influences them to smoke cigarettes. Consequently, it has promulgated regulations to block that advertising. We do not believe that those regulations by themselves will ever be effective, because tobacco companies will be able to contest any FDA charges that are brought against them, and then engage in delaying tactics in court. A couple of years later they may lose, but by then they will have finished the particular advertising campaigns that were being challenged. We have therefore offered the Reed amendment. This amendment would make the FDA's regulations effective by denying an advertising tax deduction to any company that violated them. Currently, the tobacco companies get a \$1.6 billion per year tax break because of their advertising. Withholding that tax break from them if they continue to target children with their advertising is clearly a meritorious proposal.

Some Senators have suggested that the Reed amendment is unconstitutional. We disagree. In the *Central Hudson* case, the Supreme Court ruled that commercial speech may be restricted if it is unlawful or misleading, or if there is a substantial governmental interest at stake. When it is restricted, the least restrictive means necessary to accomplish the governmental objective must be used. The Reed amendment would be constitutional under that test. The FDA, based on Institute of Medicine and Surgeon General studies, has concluded that advertising influences children to smoke, 3,000 children begin smoking each day, and one out of three smokers die prematurely. Clearly there is a governmental interest in stopping children from smoking. Also, we know that the measures that have been tried to date, such as a ban on television advertising, have been circumvented by tobacco companies. The amendment is narrowly tailored as well, because it would only apply if a company violated an FDA regulation, and because less restrictive measures to keep tobacco companies from targeting children, such as the ban on television advertising, have not worked. Those Senators who say that the *44 Liquormart* case will be used to find the Reed amendment unconstitutional are mistaken. In that case, no attempt was made to show that the restriction on alcohol advertising had any effect on liquor consumption, or even that the restriction was supposed to have that intent. That law was clearly suspect; the Reed amendment would clearly pass constitutional muster. We therefore urge our colleagues to join us in supporting this amendment.